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Supreme Court of the United States

OCTOBER TERM, 1963

No. 449

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A QUANTITY OF COPIES OF BOOKS,  
ET AL., APPELLANTS,

vs.

KANSAS.

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ARMED FORCES SUPREME COURT OF KANSAS

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FILED SEPTEMBER 6, 1963  
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 449

A QUANTITY OF COPIES OF BOOKS,  
ET AL., APPELLANTS,

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KANSAS.

APPEAL FROM THE SUPREME COURT OF KANSAS

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[fol. 3]

**IN SUPREME COURT OF THE STATE OF KANSAS**

No. 42829

STATE OF KANSAS, Appellee,

vs.

A QUANTITY OF COPIES OF BOOKS, HAROLD THOMPSON and  
ROBERT THOMPSON, d/b/a P-K NEWS SERVICE, Appellants.

Appeal from the District Court of Geary County, Kansas.

Honorable A. B. Fletcher, Jr., Junction City, Kansas,  
Judge.

**APPELLANTS' ABSTRACT**

Note: The parties will be referred to as plaintiff and intervenors as they appeared in the trial court. The transcript is in two volumes. Proceedings of August 7, 8 and 11, 1961, will be referred to as Transcript A. Proceedings of September 11, 14, and 15, 1961, will be referred to as Transcript B. Plaintiff's Exhibits 1 through 31 will be referred to as the "indicated books". Defendants' Exhibits 1 through 29 will be referred to as the "library books".

[fol. 4]

**NATURE OF CASE**

This is an action brought by the Attorney General on an Information and Search Warrant issued under the provisions of Chapter 186, Laws of Kansas, 1961, seeking to confiscate and destroy a quantity of books belonging to intervenors.

## IN DISTRICT COURT OF GEARY COUNTY, KANSAS

No. 14,102

STATE OF KANSAS, Plaintiff,

vs.

A QUANTITY OF COPIES OF LEWD, LASCIVIOUS AND  
OBSCENE BOOKS, ETC., Defendants.

INFORMATION—Filed July 25, 1961

In the name and by the authority of the State of Kansas, William M. Ferguson, the duly elected, qualified and acting Attorney General in and for said state, comes now here and gives the Court to understand and be informed that at and within the County of Geary, State of Kansas, on the 24th day of July, 1961, and prior thereto, there was and is, then and there, possessed, or kept for sale and distribution, a quantity of paper-back books, more particularly described by title in the caption hereof, at and in a building or place of business at:

The P-K News Service  
340 East 9th Street  
Junction City, Kansas

which books contain obscene, lewd and lascivious language and which books are, in their entirety, obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books, all as prohibited by Chap. 186, Laws of Kansas, 1961, and against the peace and dignity of the State of Kansas.

Wherefore, a warrant should be issued to the Sheriff of Geary County, Kansas, directing that said prohibited books aforesaid be brought before this Court and that, after notice to the owner or agent of the owner or other person in possession and control of said prohibited books of a hearing, and after such hearing, the same be by this Court

[fol. 5] ordered publicly destroyed, by burning or otherwise, at such time as the Court shall order and satisfactory return thereof made to the Court.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

TRANSCRIPT OF PROCEEDINGS HAD ON JULY 25, 1961—  
Filed July 26, 1961

The Court: This matter comes on before the Court on the 25th day of July, 1961, at 8:30 p.m. Upon information filed with the Court signed by William M. Ferguson, Attorney General of the State of Kansas, wherein the said Information states that upon belief of the said Attorney General, certain publications, i.e., paper-backed books, the same being kept for sale and distribution, fall within the purview of obscene literature as set forth in Section I, Subsection b, Chapter 186 of the Session Laws of the State of Kansas, 1961, the titles of said books being set forth in the caption of this action, and all of said books having been published as "This is an original Night Stand book". Said Information further requests the Court to view some of the said publications, and if said Court should make a finding upon reasonable belief that said books fall within the purview of said act, to issue a search warrant and to set the matter for hearing and give notice of the same as provided for in said chapter.

The Court, upon receipt of the Information, scrutinized seven volumes, they being the same but not limited to those listed in the caption of said Information, they being: "The Sinning Season"; "Backstage Sinner"; "Lesbian Love"; "Sin Hotel"; "Sin Song"; "The Wife Swappers"; and "Sex Circus". The same appear to be obscene literature as defined under Chapter 186 of the Session Laws, 1961, and give this Court reasonable grounds to believe that any paper-backed publication carrying the following: "This [fol. 6] is an original Night Stand book" would fall within the same category and would be contrary to said chapter of the Session Laws.

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Based upon the Information filed herein, and the Court's scrutiny of the said books, the Court will issue a search warrant as provided for in said chapter, and set said matter for hearing for the 7th day of August, 1961, at 10:00 o'clock a.m.; and the Court so orders that said warrant be issued forthwith.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SEARCH WARRANT AND NOTICE OF HEARING—

Filed July 27, 1961.

Whereas, an Information in writing under oath has been made to me, it appearing that there are reasonable grounds for believing that on or about the 24th day of July, 1961, at and within the City of Junction City, Geary County, Kansas, and for some time prior thereto, the exact time being unknown to this informant, there was and is possessed, or kept for sale and distribution, quantities of lewd, lascivious and obscene books, more particularly described in the caption hereof, upon the following-described premises, to-wit:

The P-K News Service  
340 East 9th Street  
Junction City, Kansas

in said county and in the buildings and appurtenances thereon, all of which was and is done contrary to the statutes made and provided and against the peace and dignity of the State of Kansas.

You Are, Therefore, Commanded forthwith to seize all copies of said described lewd, lascivious and obscene books and to bring said books before me at 10 o'clock A.M., on the 7th day of August, 1961, for a hearing then and there to be held to determine what further disposition shall be [fol. 7] made of such books in accordance with the order of this Court and the statutes of the State of Kansas.

You Are, Further, Commanded to search the above and within-described premises and buildings appurtenant thereto and to seize and take into your charge and custody all

such lewd, lascivious and obscene books, more particularly described in the caption hereof, and to keep the same subject to the terms of this warrant and then and there return this writ.

You Are Further Commanded to leave a copy of this warrant and notice of hearing with the owner of said lewd, lascivious and obscene books, or any person who may be his agent found upon said premises, and said warrant and notice of hearing shall serve as notice to the owner or owners of said books of a hearing to be had by this Court, as hereinbefore ordered, on the 7th day of August, 1961, at 10 o'clock A.M., at my Courtroom in the Courthouse, Junction City, Kansas, at which time and place said owner or owners of such books may appear and show cause why said books so seized should not be destroyed, by burning or otherwise.

Witness my official signature in said county this 25th day of July, 1961.

CERTIFICATION OF SERVICE (omitted in printing).

[fol. 8]

Case No. 14097.

The following is a list of the Titles and number of books having been published as "This is an Original Nightstand Book", seized and in my custody.

Publisher's Number	Title	Quantity Seized
1510	Born for Sin	1
1513	No longer a Virgin	76
1514	Sin Girls	77
1518	Sin Hotel	2
1519	Miami Call Girl	22
1521	Passion Trap	17
1523	Lesbian Love	6
1524	Sex Jungle	95

Publisher's Number	Title	Quantity Seized
1525	The Lustful Ones	105
1526	The Wife Swappers	39
1527	Sex Model	76
1528	The Lecher	101
1544	Lust Goddess	2
1545	Sin Camp	7
1546	\$20 Lust	12
1547	Convention Girl	7
1549	Isle of Sin	3
1550	Orgy Town	3
1551	Lover	31
1552	Sex Spy	57
1553	Trailer Trollop	27
1554	Sex Cruise	43
1555	Flesh is my undoing	57
1556	Sex Circus	27
1557	Malay Mistress	137
1559	Love Nest	90
1560	Seeds of Sin	86
1561	The Sinning Season	98
1562	Sin Song	104
1563	Passion Slave	162
1564	The Sinful Ones	145

[fol. 9]

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION TO QUASH—Filed August 7, 1961

Come now the defendant books and Harold Thompson and Robert Thompson, doing business as the P-K News Service, Junction City, Kansas, owners and distributors of said books, by and through their attorneys, Hoover & Schermerhorn, and move the court to quash the Information and Search Warrant filed herein for the reason that the Information contains matter which, if true, constitutes a legal bar to the prosecution of the offense charged, namely:

The defendant books are charged in said Information to contain obscene, lewd and lascivious language and to be in their entirety obscene, lewd and lascivious manifestly tending to the corruption of the morals of any person or persons reading said books, all as prohibited by Chapter 186, Laws of Kansas, 1961.

Movants further allege that such statute on its face and as construed and applied to defendant books in this case is in violation of the Constitution of the United States and the Constitution of the State of Kansas, as hereinafter more particularly set out.

Said act on its face and as construed and applied to the books herein arbitrarily deprives these movants of their property without due process of law, denies movants equal protection of the law and freedom of speech and press, all contrary to the provisions of the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas. The books are neither obscene, immoral, lewd or lascivious and do not contain obscene, immoral, lewd or lascivious language. The books, and each of them, are entitled to the constitutional protection afforded speech and press by the 1st and 14th Amendments to the Constitution of the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas.

[fol. 10] Section 1 of said Act on its face and as construed and applied to defendant books in this action is too broad

in its description and classification of books to be considered within the purview of this statute. It could, and in this action did, include books which are in fact constitutionally protected expressions to the extent that said section denies to movants freedom of speech and press contrary to the 1st and 14th Amendments to the Constitution of the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas. The definition set out in said Section 1 is too vague and does not constitute a legally recognized standard by which books, which are constitutionally protected can be segregated from those which are not and deny movants the equal protection of the law and deprive them of their property without due process of law contrary to the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas.

Section 1, subparagraph b of said Act on its face and as construed and applied to the defendant books in this case does not provide an adequate and legal standard capable of being applied by this court in determining whether the defendant books are in fact obscene or constitutionally protected and therefore deny to movants their freedom of speech and press contrary to the 1st and 14th amendments to the Constitution of the United States and Section 11 of the Bill of Rights of the Constitution of the State of Kansas, and deny movants the equal protection of the law and deprive them of their property without due process of law contrary to the 14th Amendment of the Constitution of the United States and Section 18 of the Bill of Rights of the Constitution of the State of Kansas.

Section 4 of said Act on its face and as construed and applied to the defendant books permits the seizure of books without prior notice to the owner thereof and a hearing and determination that said books are in fact obscene and subject to seizure and destruction. Under the provisions of this Section a determination that the books [fol. 11] here involved were not constitutionally protected was made by the District Judge upon an Information filed by the Attorney General of the State of Kansas, at an ex parte hearing at which plaintiff failed to present any com-

petent proof in support of the Information and Search Warrant, that such determination and the subsequent seizure of said books operates as a prior restraint on the circulation and dissemination of books, and that said section does not provide a limitation upon the time within which a judicial decision must be made on the merits of obscenity, thereby arbitrarily depriving movants of property without due process of law, denying them equal protection of law and denying them freedom of speech and press, all contrary to the 14th Amendment of the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas.

Said Act on its face and as construed and applied to defendant books in this case authorizing and requiring the seizure of said books is arbitrary and unreasonable and deprives movants of their right to be secure against unreasonable searches and seizures secured by the 4th and 14th Amendments to the Constitution of the United States, and Section 15 of the Bill of Rights of the Constitution of the State of Kansas.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION FOR CONTINUANCE—Filed August 8, 1961

Come now the defendants, and without waiving any constitutional objections to the statute under which this action was initiated or to any of the proceedings herein, moves the court for a continuance of the hearing on the merits of this action in order that defendants may have a reasonable time in which to prepare their defense. Defendants allege that the time between the date upon which the warrant herein was served on the defendants and the date set for hearing has not been adequate for a meaningful reading of [fol. 12] each of the books here in question, a research of the law involved and the securing of expert testimony relative to the merits of this action.

Defendants further move the court for an order requiring the plaintiff to return to P-K News Service all copies of

books seized under the warrant except those numbers of each title, not to exceed five of each, needed to facilitate the prosecution of this action.

**IN DISTRICT COURT OF GEARY COUNTY, KANSAS**

**MOTION FOR JURY TRIAL—Filed September 6, 1961**

Come now the defendant books and Harold Thompson and Robert Thompson, doing business as the P-K News Service, Junction City, Kansas, owners and distributors of said books by and through their attorneys, Hoover & Schermerhorn, and move the court for a jury trial of the issues presented by the Information filed herein.

In support of said motion movants allege that the test as to whether or not a particular book is obscene as set forth in the act here in question and under the decisions of the Supreme Court of the United States, and particularly as such test applies to the impact of said book upon the average person in the community as judged by the standards of common conscience of the community of the contemporary period of the violation charged can only be applied by jury duly impaneled from the citizens of that community.

Movants further allege that only by a jury trial of the essential issues herein presented can they be guaranteed the freedoms of speech and press through due process of law and equal protection of the law as provided by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Bill of Rights of the Constitution of the State of Kansas.

[fol. 13]

## IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MEMORANDUM DECISION—Filed September 19, 1961

The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the United States in the case of Roth vs. the United States, which was decided together with Albert vs. State of California in 354, U.S., 476, 1 L. Ed., 2d, 77 S. Ct., 1304. This Court must then look to these two decisions.

The test of obscenity as laid down by the Court in the Roth case is as follows: "Whether to the *average* person, employing *contemporary community standards*, the *dominant theme* of the material taken as a whole appeals to *prurient interests*."

The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The "dominant theme" of the book is antonymous to "isolated excerpts". Webster's New World Dictionary of the American Language, College Edition (1960), defines "prurient" as follows: "1. Having lustful ideas or desires. 2. Lustful, lascivious, lewd: as, prurient longings. 3. Itching."

The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207.10 (2), as follows: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters."

This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

[fol. 14] This Court would draw a line as between the books in question here and the books introduced by the in-

tervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any being subservient thereto.

This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection.

It Is Therefore Ordered, Adjudged, And Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said Sheriff upon the further order of this Court.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION FOR NEW TRIAL—Filed September 19, 1961

Come now intervener defendants and move the court to grant a new trial in the above-entitled cause for the following reasons:

1. Irregularities in the proceedings of the court and plaintiff, by which defendants were prevented from having a fair trial.
2. The verdict is not sustained by sufficient evidence.
- [fol. 15] 3. The verdict is contrary to the evidence.

4. The verdict is contrary to law.
5. Errors of law occurring at the trial.
6. Newly discovered evidence material for defendants, which they could not with reasonable diligence discover and produce at the trial.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

NOTICE OF APPEAL—Filed September 29, 1961

To the State of Kansas, the Above Named Plaintiff, and William M. Ferguson, Attorney General of the State of Kansas, and William D. Clement, County Attorney of Geary County, Kansas, Attorneys of Record for said Plaintiff:

Take notice that Harold Thompson and Robert Thompson, doing business as the P-K News Service, intervener defendants, do and have appealed from the order and decision rendered and made in the above entitled action on the 11th day of August, 1961, wherein the said court overruled intervener defendants motion to quash the Information and Search Warrant filed herein, and do further appeal from the order and decision rendered and made in the above entitled action on the 11th day of September, 1961, wherein the said court overruled intervener defendants motion for a jury trial and a renewal of said intervener defendants motion to quash, and further do appeal from the order and decision rendered and made on the 14th day of September, 1961, wherein said court overruled intervener defendants demurrer to plaintiff's evidence, and do further appeal from the judgment and decision of the trial court as rendered on the 19th day of September, 1961, wherein the court held the books in question to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and ordered said books to be destroyed as provided by law, and do further appeal from the judgment and order rendered and made on the 26th day of September, 1961, wherein said court overruled intervener defendants motion

[fol. 16] for a new trial, and do further appeal from all orders, rulings and decisions made in said cause and adverse to said intervenor defendants.

Dated this 29th day of September, 1961.

**ACKNOWLEDGEMENT OF SERVICE (omitted in printing).**

**IN DISTRICT COURT OF GEARY COUNTY, KANSAS**

**JOURNAL ENTRIES—Filed January 19, 1962**

On the 25th day of July, 1961, the above entitled matter came before the court on the verified information of the Attorney General for issuance of a search and seizure warrant, the state being represented by William D. Clement, County Attorney of Geary County, Kansas, and Robert E. Hoffman, Assistant Attorney General, and the matter being heard ex parte in chambers. The court having examined said information together with seven books whose titles were included as defendants in the information, and hearing the statement of counsel for the State, determined that the warrant prayed for should issue and said warrant was thereupon executed and issued directed to the Sheriff of Geary County, Kansas, to seize all copies of title as shown in said information from the premises therein described accompanying said warrant and as a part of said instrument was a notice to any who might claim ownership in the books seized or to be seized that a hearing thereon would [fol. 17] be held on the 7th day of August, 1961, as provided by law.

Thereafter and on July 29, 1961, Harold Thompson and Robert Thompson, doing business as P-K News Service, by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas, were permitted to intervene as owners of the books seized under the aforesaid warrant and a set of books so seized was delivered to Robert A. Schermerhorn as attorney for said intervenors.

Thereafter on August 7, 1961, said matter came on for hearing and intervenors filed their motion to quash the information and warrant issued herein, the state being rep-

resented by William D. Clement, County Attorney, and Robert E. Hoffman, Assistant Attorney General, and interveners being represented by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas.

Whereupon argument was had upon interveners' motion to quash and the court upon its own motion continued said matter to August 11, 1961, for the purpose of examining cases and authorities cited by counsel on said motion to quash and to consider his ruling upon said motion.

Whereupon the court recessed until August 8, 1961.

Thereafter on August 8, 1961, upon motion of interveners the matter was continued for hearing on the merits to September 14, 1961.

Thereafter on August 11, 1961, this matter came on for hearing, the state appearing by Robert E. Hoffman, Assistant Attorney General, and William D. Clement, County Attorney, and interveners appearing by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas.

Whereupon the court announced its decision upon interveners motion to quash information and search warrant by overruling said motion.

[fol. 18] Thereafter on September 11, 1961, said matter came on for hearing on interveners motion for jury trial, the State appearing by Robert E. Hoffman, Assistant Attorney General, and William D. Clement, County Attorney, and interveners appearing by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas, and after presentation of authorities and statement of counsel, the court being fully advised in the premises overruled said motion. Intervenors thereupon again moved to quash the information and search warrant, which motion was by the court overruled.

Thereafter on September 14, 1961, said matter came on for trial, the State appearing by Robert E. Hoffman, Assistant Attorney General and William D. Clement, County Attorney, and interveners appearing by their attorneys,

Robert A. Schermerhorn and Lester Hoover, of Junction City, Kansas. Counsel for both sides having announced ready for trial the State made an opening statement, introduced its evidence and rested.

Whereupon interveners demurred to the state's evidence on the ground that the state had introduced no evidence to establish community standards. After arguments and statement of counsel, the court being fully advised in the premises overruled said demurrer.

Whereupon interveners introduced their evidence and rested.

Whereupon the court recessed until September 15, 1961.

Thereafter on September 15, 1961, the state presented its summation and arguments after which interveners presented their summation and arguments.

Whereupon the court took the matter under advisement.

Thereafter on September 19, 1961, the court having heard evidence and arguments of counsel and having been fully advised in the premises issued its memorandum decision as follows:

[fol. 19]                   Memorandum Decision

The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the United States, which was decided together with *Albert vs. State of California*, in 354, U.S., 476, 1 L. Ed., 2d, 77 S. Ct., 1304. This Court must then look to these two decisions.

The test of obscenity as laid down by the Court in the Roth case is as follows: "Whether to the average person, employing *contemporary community standards*, the *dominant theme* of the material taken as a whole appeals to *prurient interests*."

The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The "dominant theme" of the book is antonymous to "isolated excerpts". Webster's New World Dictionary of the American Language, College Edition (1960), defines "prurient" as follows: "1. Having lustful ideas or desires. 2. Lustful, lascivious, lewd; as prurient longings. 3. Itching."

The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207.10 (2), as follows: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters."

This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

[fol. 20] This Court would draw a line as between the books in question here and the books introduced by the intervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any, being subservient thereto.

This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed to this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall

within the last statement and are not entitled to the said protection,

It Is Therefore Ordered, Adjudged and Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said Sheriff upon the further order of this Court.

Albert B. Fletcher, Jr., District Judge, Second Division, Eighth Judicial District.

Thereafter on September 26, 1961, said matter came on for hearing on intervenors' motion for new trial, and the state being represented by William D. Clement, County [fol. 21] Attorney, and intervenors being represented by their attorneys, Robert A. Schermerhorn and Lester Hoover of Junction City, Kansas, and after argument by counsel, the court being duly advised in the premises overruled the motion for new trial.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SPECIFICATIONS OF ERROR

1. The trial court's ruling in overruling Intervenors' Motion to Quash the Information and Search Warrant.
2. The trial court's ruling in overruling Intervenors' Motion for a jury trial and the renewal of the Motion to Quash.
3. The trial court's ruling overruling Intervenors' Demurrer to Plaintiff's Evidence.
4. The trial court's rulings sustaining plaintiff's objections to competent, relevant and material evidence offered by intervenors.
5. The trial court's decision holding the books in question to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and ordering said books to be destroyed as provided by law.

6. The trial court's ruling in overruling Interveners' Motion for a New Trial.

[fol. 22]

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

EVIDENCE ON INTERVENERS' MOTION TO QUASH  
AND COURT'S RULING THEREON

The Interveners at the hearing on the motion to quash the Information and Search Warrant introduced the following oral evidence:

Robert E. Hoffman, Assistant Attorney General, testified as follows:

He is an Assistant Attorney General and was so acting on July 25, 1961 (Tr. A-9). The Information was signed and verified by William M. Ferguson, Attorney General. The Attorney General had read seven titles before signing the Information (Tr. A-10), and spent nearly two weeks going over these books before the action was filed (Tr. A-11). He did not know whether the Attorney General compared these books with regularly accepted books found in this community dealing with sex themes (Tr. A-14).

He came to Junction City to file the Information on July 25, 1961, at about 5:00 P.M. He and the County Attorney went to Judge Fletcher's home, informed him of the Information (Tr. A-15) and left seven books with him (Tr. A-16). At 8:00 P.M., he, the County Attorney and Judge Fletcher met at the Court House. The Judge perused one or more of the books for a short period (Tr. A-18). These books had been reviewed and penciled references to certain sections were contained in the books. These were called to the attention of the court (Tr. A-19). The hearing lasted about 40 to 45 minutes (Tr. A-20).

[fol. 23] At this point the following question was asked:

"Q. And what took place during the 40 or 45 minutes of formal hearing?

Mr. Hoffman: Well, now, if Your Honor please, I would like to impose—interpose another objection here. There is in the records of the Court as furnished me by counsel a certified transcript of the proceedings prepared by a short-hand reporter and seems to me that that is the best evidence of what transpired. I can't see the point in going into the thing any further than the transcript shows.

Mr. Schermerhorn: If the Court please, I would take issue with Mr. Hoffman there, and I am certainly not taking issue with the Court in the preparing of the memorandum but the Court in preparing that memorandum had thoughts of his own on what should be put down there for purposes known only to the Court and at this point and at this stage of the proceedings I think these defendants have a right to inquire from the prosecuting officer just exactly what transpired at the hearing. We have a period of time of some 45 minutes here after the Court officially opened the formal hearing in chambers and I think we are entitled to know what, if any, evidence was introduced, what was done at that hearing which formed the basis for the Court's issuing of this search warrant, and I don't think we are bound to rely upon an informal memorandum—I say 'informal' because I don't know of any requirement of the statute for it—but a memorandum which was made by the Court at that time. If there was anything else that happened, I think we are entitled to know about it.

The Court: I think the memorandum was made, Mr. Schermerhorn, for the protection of the gentlemen you represent; and I think the memorandum speaks for itself, and the objection will be sustained."

(The witness then identified seven books which were marked "Defendants' Exhibits A through G" (Tr. A-23).)

Two of the books had penciled notations and some had slips of paper in them with penciled notations, of page [fol. 24] numbers on them (Tr. A-25). The court was informed that one wouldn't have to read far to run into a descriptive passage (Tr. A-26). Mr. Ferguson, the Attorney General, has never resided in Junction City or practiced law in this area (Tr. A-28).

On cross examination Mr. Hoffman testified concerning the Attorney General's background. He was born in Kansas, has lived here all his life, practiced law in Wellington, is a former member of the Legislature, and campaigned for Attorney General in 1960. His family lived in Kansas for two or three generations. He now resides in Topeka, which is 70 miles from Junction City (Tr. A-30).

The motion to quash the Information and Search Warrant was then argued to the court and taken under advisement. On August 11, 1961, the court ruled on the motion to quash as follows:

"Gentlemen, we are here today on the Court's order that he would give his ruling as to the owners' motion to quash the Information and Search Warrant in Case No. 14,097. The court's first thinking was to write a memorandum opinion but then on second thought the Court will so state his opinion now and at this time.

"The motion, as the Court appreciates it, filed by the owners of the property seized, goes to the procedure used by this Court and to the Act itself as construed in line with the 14th Amendment of the United States Constitution and the 11th and 18th Bill of Rights of the Constitution of the State of Kansas and also the 4th and 14th Amendment to the Constitution of the United States and the 5th Article of the Bill of Rights of the State of Kansas.

[fol. 25] "The Court will consider, in reverse order, the two propositions. First, we will look to the law itself, and on its face. It has been argued here that certain safeguards are missing from the law itself, and from the cases cited it appears to this Court that the safeguards which the owners so state are missing are, judicial discretion by the Court prior to the issuance of the search warrant as to whether the material presented to the Court appears to be obscene and the search warrant should issue; second is the definiteness of the search warrant as to what is to be seized and where it is to be seized; and third that there is no ultimate time

for decision by the Court. Looking at the law itself, the Court notes in Section 4 that the law states it shall be the duty of the judge to forthwith issue his search warrant, this being subsequent to an Information or Complaint filed, verified by the informant, the county attorney, or the attorney general and based upon information and belief. This Court feels, not as argued by the owners, that it is mandatory that the Court shall issue the order for it is inherent in the Court's right in any order it shall issue whether it be a temporary injunction, an order of any type, or a search warrant, that the Court can require additional evidence or additional information to be presented to it before it so issues a search warrant or the temporary injunction or any order. Therefore, the question becomes, then, and will be discussed later by the Court, whether the Court in this case exercised judicial discretion sufficient enough to allow due process to the owners.

"The second safeguard is that the warrant be sufficient so that the one who will execute the search warrant will know what he is to pick up and where. I think we can look at the law once again and find that it states in there: '...it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff or any other duly constituted peace officer to seize and bring before said judge or justice such a prohibited item or items'. This is within the Court's judicial discretion once again as to how specific the Court shall be. This can be attacked, but in the present case we must look to what the Court did.

"Secondly—or, third, it is our view that the safeguard of ultimate decision is lacking. The Court, based upon the Kinsey Book case and the Marcus case as argued to this Court, finds that under our statute where it states: 'At such hearing, the judge or justice issuing the warrant shall determine' is different from the statute in the Marcus case wherein it stated, as the Court recalls, that the judge shall determine, not necessarily at the hearing, not necessarily at any specific time. This time then is set in our statute by the Court giving notice as of the date of hearing and this could

be attacked in due time by a motion to quash for this Court feels that a motion to quash would so reach to the date set for hearing, and if the owners so decided, this motion could be filed immediately upon the search warrant being issued and heard within three to four days, not as in this case where the owners, of their own volition, decided to wait until the date of hearing to file their motion to quash. This Court cannot, as a matter of law, say that on the face of Section 4 that it violates the due process clause of the Constitution of the State of Kansas or the right to search and seizure under the last two mentioned.

"Also attacked under the statute is the definition and test as to what is obscene. The Court has looked to Roth v. United States and Alberts v. California and believes that the test as set forth in that case is outlined in great detail in Section 1 (a) and 1 (b) of this law when in fact in the Alberts v. California case, as I recall, the Supreme Court said that the word 'obscene' is definite and sufficient in its meaning. In this law the legislature saw fit to go further and set forth the words which constitute the definition of prurient interest as defined in the Roth case. The legislature also saw fit to set forth the test in Section (b) as to the average person in the community where the test is being applied. [fol. 27] The Court feels that the test is sufficient as set forth in Section 1 (a) and (b) of Chapter 186 to meet the requirements in the Roth case. The Court before leaving this, would like to comment on the owners' argument as to prior restraint. It has been argued that in the case of Near v. Minnesota that prior restraint was exercised. I think this is true. Upon reading the case this Court concludes that the restraint was as to future publications not in existence at the time. This is the same as in the Kinsey Book case wherein the court did not allow his injunctive order to be effective to publications not now in existence. This Court feels that prior restraint is not as constituted under the decisions of the Supreme Court applicable here.

"The next question, did this Court in any way by its procedure violate the due process clause as to this

owner! This Court, as from the testimony and from the proceedings filed in the case, believes that it exercised judicial discretion prior to the issuance of the search warrant and believes further that this was sufficient where this Court read six—I beg your pardon—scrutinized six volumes, all bearing the same notation 'Nightstand Publication' and drew from their titles and from the notations marked in the books by the Attorney General's Office and from notations noted by this Court on its own accord that books of similar titles with similar connotations being conveyed by those titles and bearing the stamp of "Nightstand Books" fall within the same category as the six books reviewed by this Court. The Court set the matter for hearing as prescribed by law. Because the owners did not come in immediately on a motion to quash is not the fault of this Court or the law of the State. They have chosen their path and the Court is so now ruling. As to length of time when ultimate decision will be reached in this particular case, this is once again of the doing of the defendant or the owner for he has filed a motion for a continuance and in this motion he states that he is not [fol. 28] prepared to go to trial on the merits at the time set. This Court cannot say to protect the owner that you must go to trial now for the Court thinks this would be a violation of due process. Therefore, the Court feels that the procedure and act done by this Court are sufficient so as not to violate the due process clause of the Constitution of the United States or of the State of Kansas and the search and seizure clause of the same and this Court rules that the motion to quash the Information and Search Warrant shall be overruled."

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

MOTION FOR JURY TRIAL AND MOTION TO QUASH  
OVERRULED—September 11, 1961

The motion for a jury trial was argued to the court and overruled. Interveners then renewed their motion to quash based upon the Court's denial of their right to a jury trial which was overruled.

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SUMMARY OF PLAINTIFF'S EVIDENCE

The State, after opening statement, offered in evidence, as Plaintiff's Exhibits 1 through 31, the books in question (Tr. B-8).

Interveners objected to the introduction of evidence on the constitutional grounds urged in support of their Motion to Quash. The objection was overruled and the books admitted in evidence. (Tr. B-9).

The plaintiff then rested its case in chief, and interveners demurred to the evidence (Tr. B-9 and 10) on the ground that plaintiff had failed to introduce any evidence tending to establish the "contemporary community standards" by which the books in question should be judged (Tr. B-11). The demurrer was argued to the Court and overruled, (Tr. B-11 through 16 and 21 through 32).

[fol. 29]

IN DISTRICT COURT OF GEARY COUNTY, KANSAS

SUMMARY OF INTERVENERS' EVIDENCE

Mrs. Lois York testified in substance that she is employed as Librarian of the George Smith Public Library in Junction City, Kansas. The Library serves all of Junction City, Geary County and the adjoining Fort Riley Military Reservation. As Librarian, she selects and purchases books (Tr. B-33). In purchasing books for the Library, she uses review magazines, publisher's materials,

catalogues and newspaper services, and patrons' requests as a guide to the public's interest (Tr. B-34). All books owned by the Library are listed in a card catalog and are available to the public (Tr. B-35). In the Library you will find books containing descriptions of sexual activities and dealing with sexual deviations such as lesbianism and homosexuality, in both fiction and non-fiction (Tr. B-36).

The witness then identified the following books as property of the Public Library, and described briefly the contents of each as follows:

"Lady Chatterley's Lover", by D. H. Lawrence, dealing with an adulterous affair. (Def. Ex. 1, Tr. B-37).

"Memoirs of Hecate County", dealing with a young boy's experience with various women (Def. Ex. 2, Tr. B-38).

"The Chapman Report", by Irving Wallace (Def. Ex. 4, Tr. B-39).

"From the Terrace", by John O'Hara, complete and unabridged (Def. Ex. 5, Tr. B-40).

"Peyton Place", dealing with rape and other sexual activities (Def. Ex. 6, Tr. B-41).

[fol. 30] "Ten North Fredericks", by John O'Hara, dealing with a sexual theme (Def. Ex. 7, Tr. B-41).

"Ulysses", by James Joyce, containing descriptions and representations of sex (Def. Ex. 8, Tr. B-41).

"From Here to Eternity", by James Jones, dealing with sexual activities in Army Life (Def. Ex. 9, Tr. B-42).

"The Magic of Their Singing", by Bernard Wolfe, containing descriptions of sexual activities (Def. Ex. 10, Tr. B-42).

"A Rage to Live", by John O'Hara, containing descriptions of sexual activities (Def. Ex. 11, Tr. B-43).

"The Bramble Bush", by Morgendahl, containing representations of sexual activities (Def. Ex. 11, Tr. B-43).

"The Sot Weed Factor", by Borth (Def. Ex. 13, Tr. B-43).

- "Winesburg Ohio", by Sherwood Anderson, containing sexual intimations and suggestions (Def. Ex. 14, Tr. B-44).
- "God's Little Acre", by Erskine Caldwell, containing descriptions of sexual activities (Def. Ex. 15, Tr. B-44).
- "The Fall of Valor", by Charles Jackson, dealing with male homosexuality (Def. Ex. 16, Tr. B-44).
- "Tobacco Road", by Erskine Caldwell, containing sexual descriptions (Def. Ex. 17, Tr. B-45).
- "The Grapes of Wrath", by John Steinbeck (Def. Ex. 18, Tr. B-45).
- "Lolita", by Vladimir Nabokov, concerned with a juvenile nymphomaniac and a middle aged man (Def. Ex. 19, Tr. B-45).
- [fol. 31] "The History of Rome Hanks", by Joseph Stanley Pennell, containing descriptions of sexual activities (Def. Ex. 20, Tr. 46).
- "Candide", by Voltaire, containing sexual descriptions of a sort (Def. Ex. 21, Tr. B-46).
- "Brave New World", by Aldous Huxley, containing a few sexual representations (Def. Ex. 22, Tr. B-46).
- "Nana", by Emil Zola, containing representations of sex (Def. Ex. 23, Tr. B-46).
- "Roxana, the Fortunate Mistress", by Daniel Defoe, containing sexual descriptions (Def. Ex. 24, Tr. B-46).
- "The Satires of Juvenal", containing sexual descriptions and representations (Def. Ex. 25, Tr. B-47).
- "The Satyricon of Petronius", containing descriptions of sexual activities (Def. Ex. 26, Tr. B-47).
- "The Young Manhood of Studs Lonigan", by Farrell (Def. Ex. 28, Tr. B-48).
- "The Song of the Red Ruby", by Mykle (Def. Ex. 29, Tr. B-48).
- The witness then identified "Tropic of Cancer" by Henry Miller (Def. Ex. 38), which she wanted to purchase but

which was too expensive. She had some requests for it. This book is privately owned in this community and is available for purchase in Kansas, and throughout the country. The theme is primarily sexual (Tr. B-38 and 39).

She also identified "The World of Suzie Wong" by Richard Mason (Def. Ex. 27, Tr. B-47), a copy of which belonged to the library but was lost.

She testified further that many of these books were on "best seller" lists. Being on a best-seller list creates reader [fol. 32] interest (Tr. B-51). These books had more than average reader interest (Tr. B-52).

On cross examination Mrs. York testified she had 20,000 books in the library. The community has a population of 20,000. There are 4,200 outstanding library cards. More of these are adult cards. 6,500 to 7,000 books are checked out each month. Approximately one-half the cards are inactive (Tr. B-54). "Lady Chatterley's Lover", "Memoirs of Hecate County" and "Ulysses" were not written primarily to introduce a sexual theme to the reader (Tr. B-56, 57 and 58). Defendants' Exhibits 1 through 29 do not represent all the books in the library dealing with sexual themes (Tr. B-61). The active adult card holders represent a cross section of the community (Tr. B-64). The request for these books (Def. Ex. 1 through 29) came from the educated class of the community (Tr. B-65). This does not mean formal education but means those who have, by reading and study, kept themselves aware of things that are going on in the world today (Tr. B-66)?

Mr. Edward A. Howard testified in substance that he is employed as Librarian at the Lawrence Public Library, in Lawrence, Kansas. He has been engaged in library work eleven years (Tr. B-66). He holds a Master's degree in Library Science and is a member of the American and Kansas Library Association. The Lawrence library has 21 of the 29 books identified by Mrs. York (Def. Ex. 1 through 29) (Tr. B-67). He has read "Lady Chatterley's Lover", "The Chapman Report", "From the Terrace", "Peyton Place", "Ten North Frederick", "From Here to [fol. 33] Eternity", "Winesburg Ohio", "God's Little Acre", "Tobacco Road", "Grapes of Wrath", "Lolita", "Brave New

"World", "The Young Manhood of Studs Lonigan" (Tr. B-68). He has also read 8 of the indicated books (Pl. Ex. 1 through 31), "Backstage Sinner", "Sin Song", "Love Nest", "Sin Devil", "Sinning Season", "Malay Mistress", and "The Wife Swappers", (Tr. B-68, 69). Four-letter words used in the vernacular to describe sexual organs and activities, excrement, urine, etc., are to be found in some of the best sellers owned by the library (Def. Ex. 1 through 29). None were found in the 8 volumes of the indicated books (Pl. Ex. 1 through 31), (Tr. B-69 and 70). In his opinion "Lady Chatterley's Lover", "The Chapman Report", "Peyton Place", "Lolita" and "The Young Manhood of Studs Lonigan" in description or representation of sexual activities go substantially beyond the candor found in the 8 volumes of the indicated books (Tr. B-78).

On cross examination Mr. Howard testified he is married and has two children, served as an enlisted man in the Army and is a member of the Plymouth Congregational Church (Tr. B-79). He and his family attend church regularly. Both of his grandfathers were Methodist Ministers (Tr. B-80). The 8 volumes of the indicated books which he read were furnished to him by counsel for Interveners. Most of these books had less than 200 pages (Tr. B-82). He was asked to read these books and compare them, on the basis of the statute, with other books which he had read (Tr. B-84). The first book he read was "Sin Devil". [fol. 34] He estimated some description of a sex act or reference to it occurred about every ten pages (Tr. B-85). All 8 books have the imprint "this is an original Nightstand Book" (Tr. B-86). "Lady Chatterley's Lover" contains one particular scene which is the most graphic description of sex which he has ever read (Tr. B-87). In his opinion Mr. Lawrence wrote "Lady Chatterley's Lover" with the express purpose of revealing the sex act and its importance to the lives of three of the characters (Tr. B-88). He has none of the 8 indicated books in his library nor has he had requests for them (Tr. B-88).

On re-direct examination Mr. Howard testified that each of the 8 copies of the indicated books which he read contained a plot or theme. In the case of some of these books there was a very obvious moral (Tr. B-89). In none of

these books was the exploitation of sex the sole purpose (Tr. B-90). Several passages in "Lady Chatterley's Lover" exceed in candor the descriptions of sex found in the indicated books (Tr. B-91).

On re-cross examination Mr. Howard testified in substance his opinion that "Lady Chatterley's Lover" exceeded the 8 volumes of the indicated books in the candor of description of sexual activities was based upon specific references to human genitals and to the mechanics of the sex act (Tr. B-93). Of the indicated books which he read "Wife Swappers" was the most candid, but would be difficult to compare with "Lady Chatterley's Lover" (Tr. B-92). "Wife Swappers" deals with five couples who form a club for the purpose of swapping mates. Part of the [fol. 35] book deals with the parties in which they engage and part with the introspection of the characters after such parties (Tr. B-93, 94).

Dr. Richard Lichtman testified in substance that he resides in Kansas City, Missouri, and is an Assistant Professor of Philosophy at the University of Kansas City. He holds a B.A. degree from the University of Pennsylvania and a Master's and Ph.D. degree from Yale University (Tr. B-95). For the past four years he has taught a course designated "The Foundations of World Literature". He also teaches a course in Esthetics which involves literature and problems connected with literature. His work in teaching has directed his interest to literature containing erotic passages and dealing with sex (Tr. B-95). He has read "Lady Chatterley's Lover", "Memoirs of Hecate County", "Rage to Live", "Winesburg Ohio", "God's Little Acre", "The Grapes of Wrath", "Candide", "Brave New World", "The Satyricon of Petronius", "The Young Manhood of Studs Lonigan". He has glanced through "The Chapman Report", "From the Terrace", "Peyton Place", "Ulysses", and "Lolita" (Tr. B-97). Of the indicated books he has read carefully "Backstage Sinner" and "Sin Song" and he has read selected passages from six others (Tr. B-98). In his opinion the representations and descriptions of sex in the indicated books are not so frank and descriptive as in the library books (Def. Ex. 1 through 29) (Tr. B-100). This is especially true of "Ulysses", "Lolita",

"The Memoirs of Hecate County", "Lady Chatterley's [fol. 36] Lover" (Tr. B-101, 102). Passages in "The Memoirs of Hecate County" are more descriptive in the mention of parts of the human body and the nature of the sexual act than the indicated books. In the indicated books perversions are alluded to in an indirect manner. In "Ulysses" perversions are clearly described (Tr. B-102). In his opinion descriptions of homosexuality, lesbianism, fellatio and cunnilingus are more excessive in the library books than anything found in the indicated books (Tr. B-103). In his estimation, based upon the two volumes of indicated books which he read, the interest is not in sex alone although sex is intertwined. "Backstage Sinner" for example deals with the problem of the repressions of an actress. This problem has to do with her sexual experiences. There are other areas in this novel which do not relate to sexual experiences. There are discussions of plays, methods of acting and the manner in which the director trains actresses (Tr. B-104).

On cross examination Dr. Lichtman testified in substance that he has taught four years at the University of Kansas City. He spent two years in the Army and one year teaching at Yale. He is married and originally came from New York City (Tr. B-107). One of the indicated books, "Sin Song", has a theme—an explanation of the nature of mass appeal—what makes a performer appeal to a large public audience (Tr. B-107). She represents a certain sort of hostility which attracts attention. It's not the sexuality of the girl that seems the crucial point because she loses this hostility and her career changes radically (Tr. B-108). The theme of "Sin Song" is not simply a connection of [fol. 37] sexual passages, but such passages simply make up the character of the theme. In other words the character of the hostility portrayed is as crucial to the theme as the character of the sex portrayed (Tr. B-108, 109).

It took him an hour and a half to read "Sin Song". He read two of the indicated books carefully and scanned eight. He noticed all of the indicated books had about the same number of pages and bore the inscription "This is an Original Nightstand Book" (Tr. B-109). They all contained references to the sexual act. There are descrip-

tions of sadism in "Sin Song" but in most cases they are not sexual in nature. There were no references to lesbianism, homosexuality, incest, or sex orgies (Tr. B-110). The sexual activities described in "Backstage Sinner" are heterosexual. The major concern of the author is whether the sexual experiences of the girl are satisfying to her. The possibility of pregnancy or venereal disease is never mentioned (Tr. B-112). There are passages in this book which do not stimulate sexual feeling—are non-erotic (Tr. B-113).

Mr. Joseph Rubinstein testified in substance that he lives in Lawrence, Kansas, is an assistant professor of bibliography and librarian at the University of Kansas (Tr. B-113, 114). His academic degrees are Bachelor of Arts, Master of Arts and Master of Library Science. He has been a librarian eight years and a professor eleven years (Tr. B-116). He has read the following library books (Def. Ex. 1 through 29): "Lady Chatterley's Lover", "Mems [fol. 38] oirs of Hecate County", "The Tropic of Cancer", "From the Terrace", "Ulysses", "From Here to Eternity", "Winesburg Ohio", "God's Little Acre", "Tobacco Road", "Grapes of Wrath", "Lolita", "Nana", "Juvenal", "Petronius", and "Studs Lonigan". Of the indicated books (Pl. Ex. 1 through 31) he has read nine and scanned four or five. He has read "Love Nest", "Sin Devil", "Malay Mistress", "Sex Model", "Expense Account Sinners", "Singing Season", "Backstage-Sinner", "The Sinful Ones", and "Convention Girl" (Tr. B-115). All of the indicated books contained references to sexual activities. All of these books also contained a plot. The descriptions of sexual activities in the indicated books do not go beyond the candor of description of sexual activities found in the library books (Tr. B-116). At least three of the library books, "Lady Chatterley's Lover", "Tropic of Cancer" and "Ulysses" go a great deal farther than anything in the indicated books. "Peyton Place", "From Here to Eternity", "The Grapes of Wrath", "Juvenal" and "Petronius" in the graphic quality of writing and the intensity in which sex activities are discussed go beyond anything found in the indicated books (Tr. B-117). Specific descriptions to which he refers are to be found in "Tropic of Cancer" at the

following pages: 85, 103, 110, 119, 122, 134, 144, 158, and more; in "From the Terrace", pages 143, 171, 298, 386, 417, 572, 578, 942 and others (Tr. B-118).

Today any part of life is considered fit for literary composition and publication. This is particularly true of [fol. 39] temporary sex, where the dominant school is the realistic. This school makes descriptions of life as graphic and precise as possible (Tr. B-119). This candor in writing is to be found in the fields of education and moving pictures as well (Tr. B-119, 120). The library books represent this shift in literary interest (Tr. B-120).

On cross examination Mr. Rubinstein testified that all the indicated books seemed to have about 190 pages, but this is a practice of modern publishing based on printing economy (Tr. B-122). "Tropic of Cancer" has 348 pages and "Lady Chatterley's Lover", 365 pages. Descriptive passages in "Lady Chatterley's Lover" are found on pages 134, 147, 156, 204, 240, 248, 263, 297, 319 and following (Tr. B-123). He has read both the expurgated and unexpurgated editions of "Lady Chatterley's Lover". In the expurgated edition there is a story but the nucleus of the story is missing. The intended effect and strength of the story is badly damaged (Tr. B-124, 125). The same result would occur if the indicated books were expurgated. Descriptive passages are found in "Malay Mistress" on pages 6, 30, 34, 41, 63, 85 and others (Tr. B-126). The Kansas University library has 900,000 to a million books. He has never seen any of the indicated books in this library (Tr. B-127). He is not familiar with any of the authors of the indicated books (Tr. B-128).

On re-direct examination Mr. Rubinstein testified that of the library books, "Candide" has 111 pages, "The Satyricon of Petronius", 182 pages, and "The Satires of Juvenal", 169 pages. In his opinion there is no relation [fol. 40] ship between the number of pages in a book and whether it is obscene (Tr. B-129).

On examination by the court Mr. Rubinstein testified in substance that the three books just mentioned were not published by the same publisher. The library books are more realistic and use greater detail in sexual references than do the library books (Tr. B-130).

On re-cross-examination Mr. Rubinstein testified he could not find the name and location of the publisher of the indicated books. Of five library books examined all identified the publisher and his address (Tr. B-132). This is general practice for commercial publishers. The University Library receives many books each year without indication of publisher (Tr. B-134). It is, however, uncommon (Tr. B-135).

CLERK'S CERTIFICATE (omitted in printing).

[fol. 48]

IN SUPREME COURT OF THE STATE OF KANSAS

No. 42,829

STATE OF KANSAS, Appellee,

vs.

A QUANTITY OF COPIES OF BOOKS, HAROLD THOMPSON and ROBERT THOMPSON, d/b/a P-K NEWS SERVICE, Appellants.

Appeal from the District Court of Geary County, Kansas.  
Honorable A. B. Fletcher, Jr., Junction City, Kansas,  
Judge.

APPELLANTS' SUPPLEMENTAL ABSTRACT  
IN DISTRICT COURT OF GEARY COUNTY, KANSAS  
INFORMATION—Filed July 25, 1961  
No. 14,097

STATE OF KANSAS, Plaintiff,

vs.

A QUANTITY OF COPIES OF LEWD, LASCIVIOUS AND OBSCENE BOOKS ENTITLED: "LOVE ADDICT", "LUST CLUB", "SEX GANG", "GANG GIRL", "CAMPUS TRAMP", "CARNIVAL OF [fol. 49] LUST", "THE WILD NIGHT", "SUMMERTIME AFFAIR", "BORN FOR SIN", "PARTY GIRL", "NAKED HOLIDAY", "THE ADULTERERS", "NO LONGER A VIRGIN", "SIN GIRLS", "PASSION SCHOOL", "SIN ON WHEELS", "SIN HOTEL", "HIGH SCHOOL SEX CLUB", "THE SIN DAMNED", "PASSION TRAP", "MIAMI CALL GIRL", "SEX JUNGLE", "THE GIRLS UPSTAIRS", "LESBIAN LOVE", "THE LECHER", "SEX MODEL", "THE LUSTFUL ONES", "THE WIFE SWAPPERS", "PASSION SHACK", "COLLEGE FOR SINNERS", "SEX CAT", "LUST GIRL", "MISTRESS OF SIN", "SEX BOMB", "THE SOUND OF LUST", "BACHELOR APARTMENT", "TRAMP", "WILD DIVORCEE", "THE TWISTED ONES", "LUST GODDESS", "SIN CAMP", "\$20 LUST", "CONVENTION GIRL", "GIRLS ON THE PROWL", "ISLE OF SIN", "SEX SPY", "LOVER", "ORGY TOWN", "SIN CRUISE", "SEX CIRCUS", "TRAILER TROLLOP", "FLESH IS MY UNDOING", "SEEDS OF SIN", "MALAY MISTRESS", "LOVE NEST", "PASSION SLAVES", "THE SINFUL ONES", "SIN SONG", "THE SINNING SEASON", each of said books having been published as "This is an original Nightstand Book", Defendants.

In the name and by the authority of the State of Kansas, William M. Ferguson, the duly elected, qualified and acting Attorney General in and for said state, comes now here and gives the Court to understand and be informed that at and within the County of Geary, State of Kansas, on the

24th day of July, 1961, and prior thereto, there was and is, then and there, possessed, or kept for sale and distribution, a quantity of paper-back books, more particularly described by title in the caption hereof, at and in a building or place of business at:

The P-K News Service  
340 East 9th Street  
Junction City, Kansas

[fol. 50] which books contain obscene, lewd and lascivious language and which books are, in their entirety, obscene, lewd and lascivious, manifestly tending to the corruption of the morals of any person or persons reading said books, all as prohibited by Chap. 186, Laws of Kansas, 1961, and against the peace and dignity of the State of Kansas.

Wherefore, A warrant should be issued to the Sheriff of Geary County, Kansas, directing that said prohibited books aforesaid be brought before this Court and that, after notice to the owner or agent of the owner or other person in possession and control of said prohibited books of a hearing, and after such hearing, the same be by this Court ordered publicly destroyed, by burning or otherwise, at such time as the Court shall order and satisfactory return made to the Court.

William M. Ferguson, Attorney General.

*Duly sworn to by William M. Ferguson, jurat omitted  
in printing.*

[fol. 118]

## IN SUPREME COURT OF THE STATE OF KANSAS

No. 42,829

STATE OF KANSAS, Appellee,

v.

A QUANTITY OF BOOKS, HAROLD THOMPSON and ROBERT THOMPSON, d/b/a P-K NEWS SERVICE, Appellants.

## SYLLABUS BY THE COURT

**OBScenity—Obscene Books—Destruction.** In a proceeding *in rem* for the confiscation of thirty-one named paperback books, it is determined that the said books were obscene and subject to seizure and destruction.

**CONSTITUTION—Obscenity.** Obscenity has no constitutional protection as to free speech by either the federal or state constitutions.

**JURIES—Right to Jury Trial.** There was no right to a jury trial in the above case, since there was no basis at common law for the within action.

Appeal from Geary district court; A. B. FLETCHER, Jr., judge. Opinion filed March 2, 1963. Affirmed.

Robert A. Schermerhorn, of Junction City, and Stanley Fleishman, of Hollywood, California, argued the cause and C. L. Hoover and William R. King, of Junction City, were with them on the briefs for the appellants.

[fol. 119] William M. Ferguson, attorney general, argued the cause and Robert E. Hoffman, assistant attorney general, and William Clement, county attorney, were with him on the briefs for the appellee.

OPINION—March 2, 1963

The opinion of the court was delivered by

JACKSON, J.: On July 24, 1961, William M. Ferguson, attorney general of Kansas, brought an action under the new

statute which had recently been passed by the Kansas legislature in relation to obscene books and writings. He thereupon caused to be filed before the district judge in Geary county at Junction City, the county seat, an information setting out that the P-K News Service of that city had in stock and possession a quantity of paper-back books which were named in the information. We are told that the judge was given seven copies of the books for perusal before issuing the warrant for seizure. The judge's remarks about his reading of the books may be found in the transcript of the proceedings of July 25, 1961. The court did not delay in issuing the warrant under the Laws of 1961, ch. 186, sec. 4. (Now also found in G. S. 1961 Supp. 21-1102c.)

Thereafter, the sheriff of Geary county was given a search warrant and notice of hearing. Harold Thompson and Robert Thompson, owners of the P-K News Service, were given notice to appear on August 7, 1961 to determine whether the books seized were obscene. After serving the warrant, the sheriff reported and certified that he had found 1715 individual copies of the paper-back books.

On August 7, 1961, the interveners—now appellants—filed a motion to quash. The court heard arguments on this motion on August 7, and on August 11, denied the motion to quash. On August 8, the appellants moved for a continuance. This motion was granted and the court continued the case until September 14. On September 6, appellants moved that they be granted a jury trial. This was denied. Thereafter, the matter was tried to the court, and the court handed down a short memorandum opinion on September 19, 1961. We are setting out the opinion here as the clearest way of showing what the trial court thought about the case:

**"MEMORANDUM DECISION  
(Filed September 19, 1961)**

"The sole question before the Court at this time is whether the books in question, as shown in the warrant issued by this Court, are obscene literature as defined in Chapter 186 of the Session Laws of the State of Kansas, 1961.

"The test to be employed under our law is taken directly from an instruction approved by the Supreme Court of the

[fol. 120] United States in the case of Roth vs. the United States, which was decided together with Albert vs. State of California in 354 U.S. 476, 1 L. Ed. 2d 1498 [sic], 77 S. Ct., 1304. This Court must then look to these two decisions.

"The test of obscenity as laid down by the Court in the Roth case is as follows: 'Whether to the *average* person, employing *contemporary community standards*, the *dominant theme* of the material taken as a whole appeals to prurient interests.'

"The four words or phrases italicized above form the yardstick by which these books are to be judged. The first two are impossible as to ascertainment to a certainty. The 'dominant theme' of the book is antonymous to 'isolated excerpts'. Webster's New World Dictionary of the American Language, College Edition (1960), defines 'prurient' as follows: '1. Having lustful ideas or desires. 2. Lustful, lascivious, lewd: as, prurient longings. 3. Itching.'

"The Court approved as a further guide the definition of obscenity in the Model Penal Code, Section 207. 10(2), as follows: 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters.'

"This Court has further kept in mind, based upon the above decisions, that sex and obscenity are not synonymous.

"This Court would draw a line as between the books in question here and the books introduced by the intervener, that being the purpose for which the books were written. In the case of the books introduced into evidence by the intervener, the core of the said books would seem to be the plot, with sex being subservient thereto and only acting as an agent to carry the plot to its intended conclusion, while in the books in question, the core would seem to be that of sex, with the plot, if any being subservient thereto.

"This Court has made the rule of the Roth case, and the test as set forth in the law in question, operative in this case in the following manner: If the books in question showed this Court that their dominant purpose was calculated to effectively incite sexual desires, and the Court further believed that they would have this effect on the average

person residing in this community, then they are not entitled to the protection of the Amendment to the Constitution. This Court believes that the books under indictment here fall within the last statement and are not entitled to the said protection.

"It Is Therefore Ordered, Adjudged, and Decreed that the books in question are found to be in violation of Chapter 186 of the Session Laws of the State of Kansas, 1961, and shall be turned over to the Sheriff of Geary County to be destroyed by said sheriff upon the further order of this Court."

Appellants have now appealed to this court and are asserting all of the matters urged to the trial court.

Turning to the statute (G. S. 1961 Supp. 21-1102a) we readily see that the first section contains a definition of obscenity. We believe that the test for obscenity which is provided is adequate and we are applying it in this case.

[fol. 121] It would seem that the vital question is whether these seized books were in fact obscene. The test for obscenity is not easy to state. It is said that Irvin S. Cobb was once called as an expert witness in a case of claimed obscenity. He was asked to give a definition of obscenity. His answer was: "If the depth of the dirt exceeds the breadth of the wit, then in my opinion the book is obscene."

Appellants argue that there was no evidence showing comparison of the seized books with other books in common circulation. The trial court did point out the difference between the seized books and some twenty-nine others that were taken from the Junction City public library.

The attorney general's brief contains a section in which each of the thirty-one seized books is listed by name and then the pages upon which obscenities occur are given along with a short description. We have checked the cited pages and find that they well bear out the descriptions. We would certainly agree that the books as a whole come within the definition found in paragraph 4 of the syllabus in *Roth v. United States*, 354 U. S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304, where it is said:

"(a) Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner ap-

pealing to prurient interest—i. e., material having a tendency to excite lustful thoughts." (p. 477)

We are of the opinion that the seized books are in fact hard core pornography. We feel certain that young G. I.'s from Fort Riley—many of whom frequent Junction City—would be of the same opinion. We believe that the seized books are obscene by the definition found in the Roth case, or by the definition found in the statute or by any other definition.

We shall now answer briefly certain other matters. First of all, obscenity is not protected by the First Amendment to the Constitution of the United States nor is it protected by the due process clause of the Fourteenth Amendment nor, of course, under section 11 of our own Bill of Rights to the Constitution of Kansas, see *Roth v. United States*, supra.

The present case is not a criminal case but a civil case. The appellants are claiming that they had a right to a jury trial. If that were true, appellants would have to point out what form of action at common law formed the basis for the present suit. Both the provision in section 5 of the [fol. 122] Bill of Rights of the state constitution which reads: "The right of trial by jury shall be inviolate" and Amendment VII of the federal constitution preserve only the right of trial by jury as it existed at common law. This action grows out of a statute, and we know of no basis for it at common law. Therefore, there was no right to a jury trial.

We believe that the currently seized books are only attempts to carry pornography to the "nth" degree; that smut and obscenities seem to be the chief purpose of the books; that the story—what there is of it—is simply a framework upon which to hang the pornography. Certainly there is no literary merit in the thirty-one books seized. They are trash.

Having considered all matters raised in this case, the order will be made to affirm the trial court's ruling. It is so ordered.

PRICE and ROBB, JJ., dissent.

[fol. 123]

## IN SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

## MOTION BY APPELLANTS FOR REHEARING

Harold Thompson and Robert Thompson, d/b/a P-K News Service, appellants, move the Court for an order setting aside the decision and judgment of the Court made and entered in the above entitled action on the 2nd day of March, 1963, and to grant a rehearing thereof for the reason that the appellants feel aggrieved by the said decision and judgment as pronounced for the following reasons:

1. The statute, Chapter 186 of the Laws of Kansas, 1961, on its face and as construed and applied by the trial court abridges interveners' freedom of speech and press, deprives them of due process and also denies them their right to be secure from unlawful search and seizure, contrary to the first, fourth and fourteenth amendments to the Constitution of the United States (Marcus vs. Search Warrants, 367 U. S. 717, 81 S. Ct. 1708).
2. The statutes as construed and applied by the trial court finding the books obscene without evidence they exceed customary limits of candor and appeal to prurient interests is unconstitutional, in violation of the first and fourteenth amendments to the Constitution of the United States. (Roth vs. United States, 354 U. S. 476, 77 S. Ct. 1304; Manual Enterprises vs. Day, 82 S. Ct. 1432).
3. The statute on its face and as construed and applied by the trial court, by reason of the absence of a provision for jury trial violates the first and fourteenth amendments to the Constitution of the United States.
4. The statute on its face and as construed and applied by the trial court is unconstitutional because it is too broad in definition, does not provide a real standard by which to judge and does not contain the element of scienter, contrary to the first and fourteenth amendments to the Constitution of the United States.

5. The books are not obscene when judged by the evidence under the standard approved in Roth-Alberts and Manual Enterprises, Inc. and the Court's decision condemning them violates the provisions of the first and fourteenth amendments to the United States Constitution.

6. It further appears from the opinion that this court in concluding that the books here in question are legally obscene has used the Hicklin test which has been rejected by the United States Supreme Court, and is contrary to the first and fourteenth amendments to the Constitution of the United States (Roth vs. United States, 354 U. S. 476).

[fol. 124] Appellants also request the court to allow oral argument on this motion if deemed proper.

Stanley Fleishman, 1680 Vine Street, Hollywood, California, C. L. Hoover, Robert A. Schermerhorn, 811 North Washington Street, Junction City, Kansas, Attorneys for Appellants.

PROOF OF SERVICE (omitted in printing).

[fol. 125]

IN SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

**MOTION BY APPELLANTS FOR ORDER STAYING ISSUANCE AND  
TRANSMISSION OF MANDATE**

Come now the appellants by and through Robert A. Schermerhorn, one of their attorneys, and moves the Court for an order staying issuance and transmission of the mandate in the above entitled appeal in the event the motion for rehearing filed this date is denied and the decision and judgment of this Court made and entered on the 2nd day of March, 1963, is re-affirmed.

In support of said motion appellants allege that they have instructed their counsel to prepare an appeal or a petition for a writ of certiorari to be filed in the Supreme Court of the United States and that it is their intention to have

such appeal or a petition for a writ of certiorari prepared and filed within the time allowed by law.

Robert A. Schermerhorn, 811 North Washington Street, Junction City, Kansas, Attorney for Appellants.

**PROOF OF SERVICE (omitted in printing).**

[fol. 126]

IN SUPREME COURT OF THE STATE OF KANSAS

Topeka

[Title omitted]

**JOURNAL ENTRY DENYING MOTIONS FOR REHEARING AND  
FOR STAY ORDER—April 15, 1963**

Motion by appellants for Rehearing is Denied. Motion by appellants to stay issuance and transmission of mandate is Denied.

[fol. 127]

IN SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed July 9, 1963**

I

Notice is hereby given that Harold Thompson and Robert Thompson doing business as P-K News Service, owners of A Quantity of Copies of Books here involved, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Kansas affirming the order, judgment and decree of a judge of the District Court of Geary County [fol. 128] in the State of Kansas, which found that 31 named books and a quantity of copies thereof were obscene in violation of Chapter 186 of the Session Laws of the

State of Kansas, 1961, and should be turned over to the Sheriff of Geary County to be destroyed by said Sheriff upon the further order of the Court.

This appeal is taken pursuant to 28 USC, §1257(2).

## II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Appellants' Abstract, which includes:
  - (a) Nature of Case.
  - (b) Information.
  - (c) Search Warrant and Notice of Hearing.
  - (d) Motion to Quash.
  - (e) Motion for Continuance.
  - (f) Motion to Amend Return.
  - (g) Order to Amend Return.
  - (h) Motion for Jury Trial.
  - (i) Memorandum Decision.
  - (j) Motion for New Trial.
  - (k) Notice of Appeal.
  - (l) Journal Entry.
  - (m) Specifications of Error.
  - (n) Evidence on Interveners' Motion to Quash.
  - (o) Plaintiff's Evidence.
  - (p) Interveners' Evidence.

[fol. 129] 2. Appellants' Supplemental Abstract and Brief, which includes:

- (a) Information.
- (b) Brief.

3. All Exhibits in evidence.
4. Opinion of the Kansas Supreme Court, including syllabus by the Court.
5. Judgment.
6. Motion for Rehearing.
7. Motion for Order Staying Issuance and Transmission of Mandate.
8. Order Denying Motion for Hearing.
9. Order Denying Motion for Stay of Issuance and Transmission of Mandate.
10. This Notice of Appeal to the Supreme Court of the United States.
11. Transcript of Proceedings—2 volumes.

### III

The following questions are presented by this appeal:

1. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, deprived appellants of their right to be secure against unreasonable searches and seizures guaranteed to appellants by the provisions of the Fourth Amendment to the Constitution of the United States, subsumed into the due process provisions of the Fourteenth Amendment to the Constitution of the United States as a limitation upon state action.
2. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to [fol. 130] authorize the search for and seizure of the books herein involved, constituted a prior restraint on the circulation of the publication involved herein and resulted in an abridgment of the exercise of freedoms of speech and press, all protected by the provisions of the First Amendment to the Constitution of the United States incorporated into the due process provisions of the Fourteenth Amendment to

the Constitution of the United States as a protection against state action.

3. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, in judging the alleged obscenity of the books solely by the standards of the community of Junction City, Kansas, abridged appellants' exercise of freedoms of speech and press guaranteed by the provisions of the First Amendment to the Constitution of the United States incorporated into the due process provisions of the Fourteenth Amendment to the Constitution of the United States as a limitation upon state action.

4. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, by reason of the absence of a provision for a jury trial of the essential issues thereunder and a denial of the said jury trial in the cause herein, despite the requests of the appellants duly made, renders the statute unconstitutional because the statute thus arbitrarily abridges appellants' exercise of freedoms of speech and press, and deprives appellants of their liberty without due process of [fol. 131] law, and denies appellants the equal protection of the laws contrary to the free speech, due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.

5. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, without proof that the books go substantially beyond customary limits of candor in the description or representation of matters pertaining to sex and nudity and without proof in addition that the books appeal to the prurient interest of the average person, abridges appellants' exercise of freedoms of speech and press, arbitrarily deprives appellants of liberty and property without due process of law, discriminatorily deprives appellants the equal protection of the laws, all in violation of the free speech,

due process and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution.

6. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, abridges appellants' exercise of freedoms of speech and press guaranteed by the provisions of the First Amendment to the Constitution of the United States, subsumed into the due process provisions of the Fourteenth Amendment to the Constitution of the United States as a limitation upon state action.

7. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein [fol. 132] involved, by failing to provide any ascertainable standards under which men of common intelligence could know what is or is not permissible; by failing to contain any requirement of scienter; by authorizing the seizure and suppression of books without any proof in the record that the books exceeded contemporary standards or appealed to the prurient interest of the average person, the record in fact showing that the books did not; by failing to provide for a jury trial on the essential issues, all operated to deprive appellants of their freedoms of speech and press, their liberty and property without due process of law and denying appellants the equal protection of the laws, in violation of the free speech, due process and equal provisions of the First and Fourteenth Amendments to the Constitution of the United States.

8. Whether the statute (Chapter 186, Laws of Kansas, 1961), on its face, and as construed and applied herein to authorize the search for and seizure of the books herein involved, in holding that the said books were obscene and should be suppressed and destroyed, abridges appellants' exercise of freedoms of speech and press, deprives appellants of their liberty and property without due process of law and denies appellants the equal protection of the laws, in violation of the free speech, due process and equal pro-

visions of the First and Fourteenth Amendments to the Constitution of the United States.

Stanley Fleishman, 1680 Vine Street; Room 700,  
[fol. 133] Hollywood 28, California; C. L. Hoover,  
Robert A. Schermerhorn, 811 North Washington  
Street, Junction City, Kansas, Attorneys for Ap-  
pellants.

[fol. 134] PROOF OF SERVICE (omitted in printing).

[fol. 135]

OFFICE OF CLERK OF THE SUPREME COURT

Topeka, Kansas, July 9, 1963

Dear Sir:

I have today received and filed Notice of Appeal to the Supreme Court of the United States in case No. 42,829, State of Kansas v. Thompson, et al., and proof of service of same.

Very respectfully,

JAMES R. JAMES

Clerk of the Supreme Court

Aug. 26, 1963—Rec'd

[fol. 136] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT  
(omitted in printing).

[fol. 137]

SUPREME COURT OF THE UNITED STATES

No. 449, October Term, 1963

A QUANTITY OF COPIES OF BOOKS, et al., Appellants,

vs.

KANSAS.

ORDER NOTING PROBABLE JURISDICTION—November 18, 1963

Appeal from the Supreme Court of the State of Kansas.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.